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1	IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA
2	TON THE DISTRICT OF NEDWISH
3	UNITED STATES OF AMERICA,) No. 8:04CR447
4	Plaintiff,)
5	vs.)
6	RICARDO BARRAZA)
7) Omaha, Nebraska Defendant.) May 5, 2021
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10	TRANSCRIPT OF SENTENCING PROCEEDINGS
11	BEFORE THE HONORABLE BRIAN C. BUESCHER UNITED STATES DISTRICT JUDGE
12	
13	A-P-P-E-A-R-A-N-C-E-S
14	FOR THE PLAINTIFF: Mr. Thomas J. Kangior
15	Assistant United States Attorney 1620 Dodge Street Suite 1400
16	Omaha, NE 68102-1506
17	EOD MILE DEEPNDANIE. Mr. Dodon C. Dontling
18	FOR THE DEFENDANT: Mr. Peder C. Bartling Bartling Law Firm
19	209 South 19th Street Suite 500
20	Omaha, NE 68102
21	COURT REPORTER: Ms. Rogene S. Schroder, RDR, CRR 111 South 18th Plaza
22	Suite 3129
23	Omaha, NE 68102 (402) 661-7383
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25	Proceedings recorded by a certified stenographer, transcript produced with computer.

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            (At 9:53 a.m. on May 5, 2021; with counsel present and the
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      defendant present via videoconference:)
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                THE COURT: We are on the record in United States of
      America versus Ricardo Barraza, Case Number 8:04CR447. This
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      matter comes on for sentencing with respect to Count I of the
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      indictment, conspiracy to distribute and possession with intent
      to distribute methamphetamine.
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           Would counsel please enter your appearances.
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                MR. KANGIOR: Good morning, Your Honor. Thomas J.
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      Kangior appearing on behalf of the United States.
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                MR. BARTLING: Judge, good morning. Peder Bartling
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      on behalf of Ricardo Barraza. He is appearing via
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      videoconference by joint motion.
                THE COURT: Mr. Barraza, do you understand your
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      interpreter and can you understand me?
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                THE DEFENDANT: Yes. I do understand the interpreter
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      because Spanish is the only language I understand.
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                THE COURT: Okay. Thank you.
           If there is anything that you do not understand, please
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      advise us and we will stop and be sure you understand.
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                THE DEFENDANT: Yes. Thank you.
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                THE COURT: The record should reflect, as noted by
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      Mr. Bartling, that the defendant is present by videoconference
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      in court today.
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           Mr. Bartling and Mr. Kangior also join in person in this
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courtroom.

Zoom.

This is pursuant to General Order Number 2020-7 and 2021-3 and the provisions of the CARES $\mbox{Act.}$

Mr. Barraza, have you and your attorney discussed your

right to be physically present during your sentencing hearing?

THE DEFENDANT: Well, he proposed to me to do it this way because I am receiving dialysis treatment and that was the most advisable thing to do. That's why we decided to do it via

THE COURT: Okay. So do you consent to this court imposing your sentence through the use of videoconferencing?

THE DEFENDANT: Yes. It is the best. I believe it is the most practical thing in order for me not to have to be moved to the court so I think that's the best.

THE COURT: I find that the defendant knowingly and voluntarily consents to proceed with this sentencing hearing via videoconferencing.

I further find that the sentencing hearing cannot be further delayed without serious harm to the interests of justice and I find this due to the current COVID-19 crisis.

This takes us to the previous plea agreement which was negotiated apparently over 15 years ago before the defendant did not appear at his sentencing hearing in this case.

Mr. Kangior, according to the PSR, I understand the United States is withdrawing or has already withdrawn the plea

1 agreement. Is that correct? 2 MR. KANGIOR: That is correct. 3 THE COURT: Mr. Bartling, do you have any comment on this? 4 5 MR. BARTLING: Judge, if I may, I will make a comment 6 now or make it when we address the objections to the PSR in 7 filing 244. I did set forth a specific objection to paragraph 16, 17, 18 and 19 that deal with the plea agreement, the 8 9 residual effect of the plea agreement and the parties' 10 continuing -- continual reliance on portions of the plea 11 agreement. 12 I do not have... 13 THE COURT: Mr. Bartling, how about we deal with this 14 further during allocution, if that's okay? 15 MR. BARTLING: Yes, Judge. And if I may, I'll just 16 put it on the record that Mr. Barraza does not -- does not 17 dispute that he failed to appear for his sentencing hearing at 18 the scheduled time and as a result the government is within its 19 bounds pursuant to the original plea agreement to withdraw the 20 same. 21 THE COURT: I do find that there is no longer a valid 22 plea agreement in this case. 23 Mr. Bartling, may I confirm with you that you have 24 received the revised presentence investigation report and the 25 revised sentencing recommendation and reviewed those documents

1 with your client? 2 MR. BARTLING: Yes, sir. 3 THE COURT: Mr. Barraza, did an interpreter read through the revised presentence investigation report and the 4 revised sentencing recommendations and go over those with you 5 and discuss it with you with your lawyer in Spanish? 6 THE DEFENDANT: Yes. 7 THE COURT: Did you understand the interpreter when 8 9 that happened? 10 THE DEFENDANT: Well, what I understood, the only 11 thing was -- well, my attorney speaks some Spanish and there 12 was no interpreter, but what I understood was the 13 recommendation from Probation, the explanation from the recommendation of Probation that was there that it was a little 14 15 bit lower and that he -- what he explained to me was that it 16 was positive, that it looked good. 17 MR. BARTLING: Judge, may I address the Court? 18 THE COURT: You may. 19 MR. BARTLING: Thank you. 20 Let the record reflect that I communicated directly with 21 Mr. Barraza in the Spanish language regarding the revised 22 presentence report as well as the revised sentencing 23 recommendation on March 30th, 2021, and he has received the 24 information contained in both of those documents from me 25 directly.

1 THE COURT: Mr. Barraza, do you agree with what 2 Mr. Bartling said about your receipt of the revised presentence 3 investigation report and the revised sentencing recommendations? 4 THE DEFENDANT: Yes. 5 6 THE COURT: Okay. Mr. Kangior, did you receive and review the same documents? 7 8 MR. KANGIOR: I have, Your Honor. 9 THE COURT: Turning to the objections, I'll start by 10 denying as moot the objection and motion for departure or 11 variance at filing numbers 86 and 87 because the guidelines and 12 PSR have changed since that time. 13 As for objections to the present PSR, the defendant has 14 filed an objection at filing number 244 relating to numerous 15 paragraphs within the revised PSR. The defendant makes legal 16 arguments that as far as the Court can discern does not 17 challenge factual assertions in the revised PSR but instead 18 dispute the applicability of various enhancements or 19 reductions. 20 I would like to handle those objections in groups in the 21 same manner as they are presented in filing number 244. I'd

same manner as they are presented in filing number 244. I'd like to address each one before hearing argument on any of them.

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Group one involves paragraphs 16 to 19 and involves the probation officer's historical discussion of the plea

agreement; however, the probation officer made clear that the guidelines contained within the revised PSR do not rely on any stipulations contained within the plea agreement.

I won't be sentencing based on agreements contained within the plea agreement and, thus, I overrule this objection.

Group two involves paragraphs 26, 34, 35 and 43 and the defendant argues he cannot be held responsible for an amount of actual methamphetamine when he wasn't charged with distribution of actual methamphetamine. Note B of United States Sentencing Guideline Section 2D1.1(c) notes that cases involving a mixture require the use of the offense level determined, quote, by the entire weight of the mixture or substance or the offense level determined by the weight of the actual. Further, under the guidelines relevant conduct includes conduct not specifically charged.

Here the guidelines adequately consider the relevant conduct in the form of the amount of actual methamphetamine the defendant possessed. As to any objection to notice, the defendant was on notice of the statutory penalties he faces and any sentence imposed will be within the statutory parameters.

Thus, I intend to overrule the second group of objections to paragraphs 26, 34, 35 and 43.

Group three involves paragraphs 11, 21, 39, 47 and 94. The defendant objects to the application of a two-point enhancement for obstruction of justice under Section 3C1.1.

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Probation correctly points out that Application Note 4(E) lists, quote, escaping or attempting to escape from custody before trial or sentencing or willfully failing to appear as ordered for a judicial proceeding as an example of a type of conduct to which an obstruction of justice adjustment applies.

For that reason, I intend to overrule defendant's objections to paragraphs 11, 21, 39, 47 and 94.

Group four involves paragraphs 40 and 48. The defendant objects to the two-point acceptance of responsibility reduction and argues he is entitled to the full three-point reduction.

He also points to the plea agreement in support of his argument. As noted, the plea agreement does not apply.

Furthermore, United States Sentencing Guidelines Section 3E1.1, Application Note 4 states that conduct resulting in an enhancement under 3C1.1, which I've already indicated my intention to apply that obstruction enhancement, ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct.

There may, however, be extraordinary cases in which acceptance of responsibility and obstruction both apply. I don't find this case to be extraordinary and am thus inclined to overrule this objection for those reasons and those outlined by the probation officer in the addendum.

Group five involves paragraph 46 which does not grant the defendant a reduction for being a minor participant. The

defendant argues his role was limited because he was not a leader or organizer and was only a drug mule. Under United States Sentencing Guidelines Section 3B1.2, Application Note 3, the Court should consider the culpability of the defendant specifically when a defendant plays a part in committing the offense that makes him substantially less culpable than the average participant in criminal activity.

As noted by the probation officer, while the defendant's primary role was to transport drugs, his knowledge and understanding of the scope of the criminal activity is clear. He was aware that he was transporting illegal substances and willingly did so on more than one occasion. In fact, by his own admission, he had also transported drugs in June and August of 2004.

Accordingly, I don't find the defendant to be substantially less culpable than the average possessor or distributor of methamphetamine and I intend to overrule this objection.

Group six involves paragraphs 48, 51 and 93. The defendant objects to the guideline calculations contained in these paragraphs as a result of his prior objections; however, as things currently stand, I intend to overrule all objections presented, thus, I would also overrule this objection.

Group seven involves paragraphs 106 and 108 and the probation officer's failure to recommend or supply facts

related to a departure. Because the recommendation and allocution are the appropriate places for this argument, I'll overrule this objection without prejudice to consideration during allocution.

I provided these thoughts in order to streamline this process so we can focus on arguments that were not previously provided in the brief on those objections that require such arguments. I will revisit my intended rulings after the oral argument on this matter.

So at this point I would ask Mr. Bartling to provide any further argument that you have that was not contained in your brief.

MR. BARTLING: Thank you, Judge, for setting forth your analysis and thoughts.

For the record I renew these objections and incorporate the written arguments at filing 244 into my presentation now in keeping with the Court's request to streamline the defense arguments.

Focusing only on content not included in pleading 244, allow me to say the following:

Generally with respect to the plea agreement that the

Court has found not applicable to this case, both sides -- both

sides tacitly appear to be relying on the spirit of that

agreement. The spirit of the agreement makes an impact on the

Court's analysis in several respects.

With respect to group two of the Court's analysis,

Mr. Barraza urges you to view the obstruction enhancement at

3C1.1 through the totality of the circumstances. Mr. Barraza

acknowledges that he did not appear for sentencing originally.

He has, however, set forth at least nine circumstances in which

he provided affirmative action or effort that suggest he did

not obstruct this case.

What does not appear in pages 2, 3 and 4 of filing 244 is that the government, with its agreement to allow Mr. Barraza to be eligible for the safety valve, has effectively, if not tacitly, indicated that Mr. Barraza's decision to return to the United States and turn himself in to authorities mitigates his decision to abscond.

As a result, although Application Note 4(E) of 3C1.1 applies to the matter technically, that application note does not appear to contemplate a circumstance in which a party fails to appear for sentencing based on the motives that Mr. Barraza had nor does it appear to contemplate a circumstance in which upon return there is an acknowledgement by governmental authorities that Mr. Barraza was sufficiently compliant with their requests to warrant eligibility for safety valve.

Based on the content of filing 244 and this additional argument, Mr. Barraza asks the Court to sustain the objections that the Court has labeled group two.

With respect to group three, Mr. Barraza highlights two

points. First, the tests between the applicability of 3C1.1 and 3E1.1 are different. It is undisputed that the government wasted no time, no energy and expended no resources to prepare the matter at bar for trial. Although the Court has rejected the plea agreement, the language that filing 244 cites regarding Mr. Barraza's prompt notification to the government of his intention to enter a guilty plea appears in filing 244 to confirm the government's position with respect to acceptance of responsibility.

To take that analysis a step further, the Court is aware that Mr. Barraza has not challenged evidence in this case in the form of drug quantity or lab results and has not required the government at this sentencing hearing to produce witnesses or other information regarding his plea of quilty.

Furthermore, Mr. Barraza has not attempted to withdraw his plea. He has, in fact, stood on his plea of guilty. The arguments that he made in filing 244 with respect to group two have to do with policy arguments, they are not challenges to the Court's finding of guilt nor are they tacit attempts to indicate anything other than acceptance of responsibility for the crime for which this court committed -- convicted him.

As with the group three objections, the objections to group four must be viewed in light of the government's agreement that Mr. Barraza is eligible for the safety valve for the reasons set forth in the arguments related to group three.

Finally, with respect to the interaction between group three and group four, Mr. Barraza avers to this court that it's fundamentally unfair to impose two consequences or two sanctions for the exact same conduct and that is why 3C1.1 allows the Court in its discretion to impose a two-point increase for obstruction of justice while at the same time allowing for a two- or three-point reduction in offense level due to acceptance of responsibility.

With respect to group five and group six, Mr. Barraza submits those arguments based on filing 244.

With respect to group seven, Mr. Barraza thanks the Court for the opportunity during allocution to discuss the relevance of a departure in this matter.

Thank you.

THE COURT: Mr. Kangior, do you have any response or comments?

MR. KANGIOR: Your Honor, I agree with the probation office's application of the guidelines to the facts of this case. I also find it to be consistent with the office's application of the guidelines in prior cases and, therefore, I'd ask that you adopt their findings.

THE COURT: After consideration of Mr. Bartling's arguments, I overrule the objections presented in filing number 20 -- 244 and adopt the revised presentence investigation report without change.

1 I note that this case involves a mandatory minimum 2 sentence of ten years but the defendant meets the criteria for 3 the statutory and quideline safety valve. Is that correct, Mr. Kangior? 4 5 MR. KANGIOR: Yes, Your Honor. 6 THE COURT: I will now address the guideline calculations in this matter. The total offense level is 34 and 7 the criminal history category is I. The guideline custody 8 9 range is 151 to 188 months. The guideline range for supervised 10 release is two to five years. The defendant is ineligible for 11 probation. The fine range is 17,500 to 4 million. Community 12 restitution may be required. A special assessment of \$100 is 1.3 to be assessed. 14 Have I accurately stated the sentencing guideline provisions in light of my ruling on the various objections, 15 16 Mr. Kangior? 17 MR. KANGIOR: Yes, Your Honor. 18 THE COURT: Mr. Bartling. 19 MR. BARTLING: Yes, Judge. 20 THE COURT: Defendant's motions for downward 21 departure and downward variance appear at filing numbers 242 2.2 and 243, respectively. I've also read the defendant's 23 sentencing memorandum at filing number 245. 24 Mr. Bartling, I plan to consolidate argument on these 25 motions with allocution along with your arguments on paragraphs

106 and 107. Does that work?

MR. BARTLING: Yes, Judge. Thank you.

THE COURT: Thank you. You may proceed with allocution.

MR. BARTLING: Thank you, Judge.

Your Honor, for many reasons the matter at bar is unique. The Court has received Ricardo's sentencing memorandum at filing 245. The memorandum supports Ricardo's motions for departure and variance and sets forth Ricardo's rest -- request for a sentence of time served and the basis for the request.

I will not repeat the memorandum here. The Court has acknowledged that it has read it. I will, however, highlight for the Court a few important considerations for the purpose of calculating sentence.

The first, despite the breakdown of the plea agreement, the government has agreed that Ricardo is safety valve eligible. This agreement is important to Ricardo for at least four reasons.

First, the agreement is an acknowledgement, tacit, if not overt, that Ricardo provided the government with substantial assistance in the matter. Specifically Ricardo provided information that led to arrest and prosecution of co-conspirators. He did not lie, he did not withhold information, and the memorandum sets forth the details of his further cooperation. Absent the abscond status in this case,

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the United States Attorney's Office would have filed a motion to give Mr. Barraza consideration pursuant to Rule 35(b).

Second, the agreement is an acknowledgement, tacit, if not overt, that Ricardo's decision to return to the United States, turn himself in to law enforcement authorities mitigates his decision to abscond.

Third, the agreement is an acknowledgement, tacit, if not overt, that Ricardo accepted responsibility for his offense conduct.

Fourth, the presence of the agreement means that the government understands that the Court is authorized to impose a sentence below the mandatory minimum. Absent the agreement, given the Court's guideline calculation, such a sentence would not have been possible.

The second major consideration for the Court is that neither the government nor Probation are disputing the severity of Ricardo's physical condition. The sentencing memorandum at filing 245 went to great lengths to detail for the benefit of the Court and those who do not have prior medical training the conditions from which Ricardo suffers.

Principal among that information is that the condition from which Ricardo suffers is fatal. The memorandum also dispels incorrect notions that nonmedical personnel may have about care options meaning the care options are not treatment per se for the condition from which Mr. Barraza suffers.

The strapping young man depicted on page 3 of the revised presentence report was photographed in 2004. The man who appears for sentencing 17 years later is a shell of that man. If it weren't for machines, Ricardo would not be alive to appear at this sentencing hearing today.

Please rely on the content of the sentencing memorandum when crafting your sentence. As with the facts of the revised presentence report, the facts in the sentencing memorandum are not in dispute. Mr. Barraza requests that you take all of the facts, both from the revised report and his sentencing memorandum, into consideration and that you evaluate this unique case and thereafter use your discretion to craft a sentence that fits Mr. Barraza where he is on May 5th, 2021.

For the reasons set forth in the sentencing memorandum,
Mr. Barraza asks you to adopt his requested sentence in filing
245.

Thank you for your consideration.

THE COURT: Mr. Barraza, you do not have to speak but now is the time for you to address the Court if you wish to say something before I pronounce a sentence.

Would you like to say anything?

THE DEFENDANT: Well, all I want to say is that I am very remorseful for what I did and I'm here ready to face justice. The mistakes I made, it was made by a younger man, more immature, and time has gone by and not only have I matured

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but I also have I -- gone into the path of the Lord and I am not fleeing anymore. It is my intention to face the facts and face my sentence because if I were to flee, I would not be following in God's path and surrender to God's will so please bear this in mind at the time of deciding my sentence.

I would not be renegading against it because it would be the same as renegading against God who is all present and all mighty so please have some consideration towards my situation and hopefully you will give me the opportunity to keep, you know, living, to fight for my life and do whatever it takes. I don't know what it has in store for me and it requires a lot of discipline on my part to get on but please that's all I ask of you, to have some consideration and may God bless you, Judge.

THE COURT: Mr. Kangior, allocution from the government.

MR. KANGIOR: Your Honor, I agree that there are some unique facts in this case for you to take into consideration.

I also agree with the probation office's sentencing recommendation that these facts do warrant some sort of variance in this case. The degree of that variance I submit to the Court's discretion.

THE COURT: Is there any reason that a sentence should not now be pronounced? Mr. Kangior.

MR. KANGIOR: No, Your Honor.

THE COURT: Mr. Bartling.

MR. BARTLING: No, sir.

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THE COURT: In crafting this sentence, I have considered all factors outlined under 18 U.S.C. Section 3553(a), including general -- including general deterrence, specific deterrence, protection of the public, the need to avoid unwarranted sentencing disparities, and the specific history and characteristics of the defendant.

The Court has also considered the seriousness of the conduct, the need to promote respect for the law, and the need to provide just punishment for the conduct at issue.

The Court further recognizes that the United States

Sentencing Guidelines are advisory in nature and finds that the sentence about to be pronounced is sufficient but not greater than necessary to comply with the purposes of 18 U.S.C. Section 3553(a).

I note that in the sentencing memorandum defendant notes that, quote, despite having self-surrendered the U.S. Marshal recognizes that Ricardo's dilapidated body meant transportation to Nebraska would have to wait. Doctors and nurses in Southern California spent the next two months providing Ricardo with life-saving medical intervention.

It appears clear that the defendant's life was saved by the Bureau of Prisons by providing the defendant medical care that was not otherwise available to him and this appropriately happened despite the fact that the defendant ignored the laws

of this country and absconded for over 15 years.

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There is no excuse for defendant's conduct here.

I hereby sentence the defendant, Ricardo Barraza, to a term of 151 months of incarceration. That term of imprisonment is to run consecutively to any other sentence he may be currently serving.

This sentence illustrates that I will not depart or vary.

Departure or variance is not warranted under the circumstances

because of the conduct of the defendant and the need to enforce

the laws of the United States and discourage people from

absconded from their commitments.

Related to incarceration I recommend the following:

The defendant receive educational or vocational training in accordance with past skills and education.

Is there a recommendation from the defendant with regard to location of incarceration?

MR. BARTLING: Yes, Judge. Mr. Barraza is requesting a recommendation for a federal medical center.

THE COURT: I will make such a recommendation.

Upon release from prison, the defendant shall be placed on five years of supervised release. I intend to follow the mandatory and special conditions of supervised release set out in the sentencing recommendation.

Do the parties have objections to any of those conditions? Mr. Kangior.

1 MR. KANGIOR: No, Your Honor. 2 THE COURT: Mr. Bartling. 3 MR. BARTLING: No, Judge. The special and mandatory conditions are 4 THE COURT: ordered. 5 The standard conditions of supervised release are 6 also imposed. 7 I am not going to impose a fine because the defendant could not pay one and is not expected to be able to pay one in 8 9 the foreseeable future. 10 A \$100 special assessment will be imposed. 11 The defendant should be given credit for any time served 12 and shall cooperate in the collection of a DNA sample at the 1.3 direction of the probation officer or the Bureau of Prisons if 14 that not -- has not already occurred. 15 That is my judgment and sentence in this case. 16 Mr. Barraza, you have the right to appeal this matter to a 17 higher court and you have 14 days from today in which to file 18 the appeal. You may discuss this matter with your lawyer and 19 have your lawyer file the appeal. 20 Are there any other questions or any other matters that 21 need to be taken up at this time? 2.2 MR. KANGIOR: No, Your Honor. 23 MR. BARTLING: No -- no, sir. 24 THE COURT: The defendant is remanded to the custody 25 of the marshal to be delivered to the Bureau of Prisons.

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We are adjourned.
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            (Adjourned at 10:58 a.m.)
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            I certify that the foregoing is a correct transcript from
      the record of proceedings in the above-entitled matter.
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                /s/Rogene S. Schroder
                                                     May 27, 2021
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                Rogene S. Schroder, RDR, CRR
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